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No. 90-763

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK T. FREY and CHRISTINE L. FREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly determined that the United States did not release a federal tax lien on real property and that the petitioners purchased the property subject to the lien.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) and the order of the district court (Pet. App. B1-B7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. The petition for a writ of certiorari was filed on November 13, 1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the

amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT

1. On June 16, 1976, Alvin and Patricia Feliciano (the taxpayers) acquired title to certain real property (the Property) located in La Verne, California. On December 21, 1984, the United States lawfully assessed internal revenue taxes against taxpayers in the amount of $187,294.66. Pet. App. B2. Notice and demand for payment of these taxes were made as prescribed by law. On March 13, 1986, a Notice of Federal Tax Lien was filed with the Los Angeles County Recorder's Office. *Ibid.*

2. On May 8, 1986, the Internal Revenue Service (IRS) levied on the Property pursuant to Section 6331(a) of the Internal Revenue Code (26 U.S.C.) to collect income taxes and interest owed by taxpayers. On November 12, 1986, taxpayer Patricia Feliciano filed a Chapter 7 petition in the United States Bankruptcy Court for the Central District of California. Pet. App. B2. This filing automatically stayed any collection proceedings under the enforcement levy. 11 U.S.C. 362. The IRS did not receive actual notice of the filing of the petition until February 6, 1987. Pet. App. B2.

3. During February and March of 1987, two lienholders senior to the IRS moved for relief from the automatic stay to foreclose on the Property for defaults under deeds of trust totaling approximately

$80,000. There was also a third lien on the Property, senior to that of the IRS, in the amount of $14,000, recorded by the State of California. Pet. App. B2.

4. To avoid foreclosure, Ms. Feliciano placed the Property for sale. On February 23, 1987, an escrow was opened for the purchase of the Property by petitioners Mark T. Frey and Christine L. Frey. Petitioners had obtained a title report that disclosed the existence of the federal tax lien, and it was a condition of the sale that title to the property be delivered free of all monetary liens, including the federal tax lien. Pet. App. B3.

5. Because the filing of the petition in bankruptcy invoked the automatic stay provisions of 11 U.S.C. 362, on March 12, 1987, an Internal Revenue Agent executed a release of the enforcement levy on the Property. Ms. Feliciano has stated that she had the impression that this document released not only the enforcement levy but also the federal tax lien itself. The only basis she had for this belief, however, was that the agents were friendly and appeared sorry for her. Pet. App. B3, B6. But the document signed by the Revenue Agent "is clearly entitled 'Release of Levy.'" *Id.* at B6. Moreover, Ms. Feliciano does not assert that any IRS representative stated that the lien would also be released. *Ibid.*

6. Petitioners state that, following the execution of the Release of Levy, they were told by their real estate agent that the federal tax lien had also been removed from the Property. Indeed, the final title report prepared for the title insurer "failed to reflect the federal tax lien which was still of record." Pet. App. A3. On May 22, 1987, petitioners closed their purchase of the Property from the taxpayer. The proceeds of the sale were distributed to pay off

the senior mortgage lienholders and the lien of the State of California. The taxpayer received approximately $3,000 following disbursement to these three lienholders. The IRS was not notified of the sale, received none of the proceeds of the sale, and did not at any time issue a release of the federal tax lien on the Property. *Ibid.*

7. On October 22, 1987, the IRS discovered that the Property had been sold, and on February 22, 1988, the IRS levied upon the Property (now owned by petitioners) to collect the amount of the outstanding federal tax lien. Pet. App. A3. On April 22, 1988, the Freys filed a complaint in the United States District Court for the Central District of California, seeking a determination that they were entitled to a release of the federal tax lien on the Property. *Id.* at B3. The district court rejected the Freys' arguments and granted summary judgment to the United States. *Id.* at B7.

8. The Ninth Circuit affirmed. The court of appeals held that petitioners had failed to establish that the government had wrongfully levied upon the property, because the facts clearly established that petitioners bought the property subject to the federal tax lien. The court held that there was no basis for finding the United States to be estopped because of any conduct on the part of the Internal Revenue Service agents assigned to collection of the tax liability in question. Finally, the court, after examining California law (see, *e.g.*, *Aquilino* v. *United States*, 363 U.S. 509 (1960)), concluded that in the circumstances petitioners were not entitled to the benefits of equitable subrogation. Pet. App. A3-A6.

ARGUMENT

1. In the district court and in the court of appeals, petitioners asserted (i) that the United States is now estopped from levying on the Property due to the 1987 release of levy resulting from the automatic bankruptcy stay and (ii) that petitioners are subrogated to the positions of the senior lienholders whose liens were paid from the sale proceeds. The courts below correctly rejected these claims.[1] Pet. App. A4-A6, B4-B7.

Petitioners do not seek further review of these two issues that were addressed and decided below. Instead petitioners now seek to contend that, under the Internal Revenue Code and the Fifth Amendment to the United States Constitution, the federal tax lien extends only to the taxpayer's "equity" in the Property and not to her fee simple interest in the Property. These questions, however, were not addressed or decided below.[2] Review of these questions by this Court is thus unwarranted. *E.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

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[1] The question of subrogation is a question of state law. Congress provided in Section 6323(i)(2) of the Code that "Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 * * *." Petitioners do not seek review of the lower court's determination that petitioners were not entitled to the benefits of subrogation under California law.

[2] Moreover, at least with respect to the constitutional claim, it does not appear that petitioners raised the issue in the courts below.

2. Section 6321 of the Internal Revenue Code provides that, if any person liable to pay any tax neglects or refuses to pay that tax after demand, the amount of the tax (including interest, additions, penalties or costs that may accrue) "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 6322 of the Code provides that the lien imposed by Section 6321 arises upon assessment of the tax and continues "until the liability * * * is satisfied or becomes unenforceable by reason of lapse of time." On the date of the sale of the Property to petitioners, the federal tax lien still encumbered the Property since the taxpayer had not satisfied the tax lien on or prior to that date. While Congress has provided that the federal tax lien is ineffective against a "purchaser" until notice of federal tax lien has been filed (Section 6323(a) of the Code),[3] the petitioners bought this property after notice of the federal tax lien assessed against the taxpayer had been recorded. Accordingly, the Property was transferred to the petitioners subject to the preexisting federal tax lien. See *United States* v. *Rodgers*, 461 U.S. 677, 691 n.16 (1983); *United States* v. *Bess*, 357 U.S. 51, 57 (1958).

In numerous similar cases, courts have concluded that the federal tax lien attaches to the taxpayer's fee simple interest in the real property in question and not simply to the "equity" retained by the taxpayer in that property. See *Fidelity Nat'l Title Ins.*

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[3] The predecessor of Section 6323(a) was added by the Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016, after this Court held in *United States* v. *Snyder*, 149 U.S. 210 (1893), that the government's unfiled lien was good even against a subsequent good faith purchaser of the property.

Co. v. *Department of the Treasury*, 907 F.2d 868 (9th Cir. 1990); *Simon* v. *United States*, 756 F.2d 696 (9th Cir. 1985); *Little* v. *United States*, 709 F.2d 517 (9th Cir. 1983). The fact that the fee simple interest was encumbered by senior liens that were removed after the federal tax lien was filed does not alter the statutory scope of the lien, which extends to the taxpayer's entire interest in the property. As the court explained in *Fidelity Nat'l Title Ins. Co.*, 907 F.2d at 871:

> It is true that the IRS was placed in a better position after the * * * sale than it was in prior to the sale. * * * [But] the IRS did not obtain its lien through false means. It duly assessed taxes * * * and properly recorded its lien. Any potential purchaser would have been on notice regarding the IRS lien if that purchaser had performed a careful title search.

The lien against the Property remained valid until it was removed or extinguished. Since it was a lien against the Property itself, the government was entitled to seize and sell the Property even though title had passed to the petitioners. Section 6331 of the Code; *United States* v. *Donahue Industries, Inc.*, 905 F.2d 1325, 1330-1331 (9th Cir. 1990).

3. Nothing in this situation supports a claim of a violation of the Due Process Clause of the Constitution. While petitioners may have a remedy against the advisors who failed to detect and inform them of the continued, recorded existence of the federal tax lien, the failure of petitioners' advisors to do so cannot create a constitutional objection to enforcement of the lien by the United States. The Fifth Circuit, in rejecting a similar claim, held that no violation of Due Process was demonstrated where, as here, the

complaining party "was entitled to full judicial consideration, in an adversary context, of the validity of the levy" and, in such a proceeding, "was entitled to show that the liens had not properly attached to the property in question, that the liens had been discharged through foreclosure and sale of the property, that the liens had been discharged through payment of the tax assessed, that his own interest in the property was superior in rank to the federal tax liens, and that the government had failed to follow the procedural requirements" of the Internal Revenue Code dealing with federal tax liens and levies. *Myers* v. *United States*, 647 F.2d 591, 603 (1981). Petitioners offer no contrary authority. There is no conflict among the circuits or other basis for further review of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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